IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2254 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MEDICAL OFFICER

Versus

SAVJIBHAI TRIKAMBHAI KANSAGRA

Appearance:

1. Special Civil Application No. 2254 of 2001

MR SUDHIR SHAH for Petitioners No. 1-2

MR PH PATHAK for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 18/01/2002

ORAL JUDGEMENT

Heard Mr.Nirzar Desai, learned advocate for Mr.S.V.Shah, appearing on behalf of the petitioner and Mr.P.H.Pathak, learned advocate appearing on behalf of the respondent workman on caveat.

Rule. Mr.P.H.Pathak, learned advocate for the respondent workman, waives service of rule. With the consent of the learned advocates for the parties, this matter is taken up for final hearing.

#. By way of present petition, the petitioner has challenged the award passed by the Labour Court, Jamnagar in Reference No.143 / 1997 dated 22nd December, 2000, wherein the labour court has granted reinstatement with continuity of service with 25 % backwages for interim period.

#. Learned advocate Mr.Nirzar Desai has raised contention that the respondent workman was daily rated driver, was not appointed on permanent basis and moreover, the respondent workman was not qualified according to the rules. It is also his contention that the respondent workman was not recruited as per the rules and his services were terminated because of the appointment of the regular driver in his place and therefore, services of the respondent workman has been terminated as per the appointment order and therefore, there is no need of compliance of Section 25-F of the Industrial Disputes Act, 1947. It is submitted that all these contentions were raised in the written statement in para-1 & 5. Therefore, the labour court has committed gross error while not considering all these aspects and therefore, the award impugned passed by the labour court, is required to be quashed and set aside.

#. Learned advocate Mr.P.H.Pathak appearing on behalf of the respondent workman on caveat has submitted that there was no dispute of the period of employment served by the respondent workman from 1994 to 1997. Not only this, there was no disputed between the parties that he has completed 240 days during the period of one year. It is also undisputed between the parties that the provisions of Section 25-F have not been complied with by the petitioner. Learned advocate Mr.Pathak has also submitted that witness Dr.Pravinchandra Gautam of the petitioner has been examined vide Exh.25 who has deposed before the labour court that in place of the respondent workman, one Praffulbhai Bhadani has been appointed. He also submitted that it is not clear from the record whether he was regular or temporary. He also submitted that reason given by the Dr.Gautam in his deposition that reason for termination is regular appointment of Prafulbhai Bhadani but in reality, according to his deposition, the jeep become useless and therefore, services of the respondent workman has been terminated.

Therefore, this is clear admission on the part of the witness of the petitioner. It is also submitted that Section 25-F is mandatory provision as per the view taken by the Apex Court in reported decision in AIR 2000 SC 454. The compliance of Section 25-F is must, otherwise, the order of termination becomes null and void. It is also submitted that the respondent workman has admitted for some time he was gainfully employed and this aspect has been taken into account by the labour court and accordingly not awarded 75 % backwages to the respondent workman and merely granted 25 % backwages for interim period. Therefore, it is submitted that the entire award passed by the labour court is based upon the evidence which was on record and as such, no error has been committed by the labour court or there is no jurisdictional error and therefore, interference by this Court under Article 226 and 227 of the Constitution is not called for.

#. I have considered the submissions of the learned advocates for the parties. In para-6 of the award passed by the labour court, Jamnagar, it is observed that it was undisputed between the parties that the respondent workman has completed 440 days continues service before terminating his service. Even this fact has been specifically mentioned by the labour court in para-6 on appreciation on the basis of the record produced before the labour court. It is also undisputed fact between the parties that at the time of termination, Section 25-F was not complied with and one more fact that new person has been recruited in place of the respondent workman. The reason for termination has been clearly mentioned by witness Dr.Pravinchandra Gautam at Exh.25 that because the jeep became useless and therefore the services of the respondent workman has been terminated. The another reason given by the petitioner that the respondent workman was appointed for the period till appointment of regular driver seems to be not correct. The labour court has also considered various decisions of the Apex Court in respect of counting of 944 days continues service including holidays, Saturdays and Sundays, so also, considered the decisions of this Court and ultimately come to the conclusion that termination without compliance of Section 25-F, is null and void. Thereafter, the labour court has considered the question of backwages and relying upon the deposition of the respondent workman, come to the conclusion that during the interim period, the respondent workman was gainfully employed while doing agricultural work and therefore, the labour court has denied 75 % backwages of interim period.

#. So far the contention which has been raised by the learned advocate Mr.Nirzar Desai that the respondent workman was not appointed according to the Rules and his appointment is back door entry and therefore the provisions of the Industrial Disputes Act are not applicable. This contention has been specifically considered by the Apex Court in case of VIKRAMADITYA PANDEY V. INDUSTRIAL TRIBUNAL reported in 2001 AIR SCW 310. The Apex Court has observed that reinstatement with back wage, denial, propriety - Clerk employed in co-operative bank on ad hoc basis, continues service extended for over three years with small motivated breaks, termination of his service found to be illegal. It is also observed that denial of relief of reinstatement with backwages on ground that his recruitment was not as per the service rules and that service rules prevail over Labour Laws, improper. Service Regulations do not prevail over Industrial Disputes Act. However, considering fact that order of termination was about 15 years old backwages allowed only to the extent of 50 %. Specific observations made by the Apex Court in para-6 of the said judgement are quoted as under :-

"6. We have carefully considered the respective contentions made on behalf of the parties. It is not in dispute that the Award passed by the Tribunal was not challenged by the Bank. The Tribunal as well as the High Court have concurrently found that the case of the appellant was one of retrenchment and that the appellant was working between the period 4.12.1981 to 19.7.1985 with small motivated breaks and that in any case he worked for more than 240 days in a year before termination of services. The Tribunal in para 5 of its Award has stated thus:-

"It is however evident that he worked for much more than 240 days in an year before his service ceased. It is also clear that breaks were given and ad hoc appointment made every time for 90 days or less. This was evidently done to stick to the letter of the law regarding the authority of the bank in regard to making appointments only for limited periods in ad hoc or temporary arrangement, as specified in the service Regulations, 1975. It is however, clear that services of the workman were needed as the work was available but a continuing temporary appointment was bot made even though under

Regulation 5 (iii) of the Service Regulations such longer term stop-gap appointment (and not only for 90 days) can be made with prior approval of the competent authority (the Board). It would thus, appear that attempt was made confirm to the letter of law and not its spirit in so far as provisions regarding retrenchment under the Industrial Disputes Act go."

The only issue before the High Court was whether the appellant was entitled to reinstatement in service with back wages, one the termination of his services had been held to be illegal and moreso when the same was not challenged. Ordinarily, once the termination of service of employee is held to be wrongful or illegal the normal relief of reinstatement with full back wages shall be available to an employee; it is open to the employer to specifically plead and establish that there were special circumstances which warranted either non-reinstatement or non-payment of back wages. In this case we do not find any such pleadings of special circumstances either before the Tribunal or before the High Court. Since Regulation 103 of the Regulations is referred to in the order of the Tribunal as well as in the High Court and it has bearing in deciding the controversy, the focus is needed on it. It reads :-

"103. The provisions of these regulations to the extent of their inconsistency with any of the provisions of the Industria Disputes Act, 1947, U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962, Workmen's Compensation Act, 1923 and any other Labour Laws for the time being in force, if applicable to any Co-operative Society or class of co-operative societies, shall be deemed to be inoperative."

By plain reading of the said Regulation it is clear that in case of inconsistency between the Regulations and the provisions of the Industrial Disputes Act, 1947, the State Act, the Workmen's Compensation Act, 1923 and any other Labour laws for the time being in force, if applicable to any co-operative society or class of co-operative societies, to that extent Regulations shall be deemed to be inoperative. In other words, the inconsistent provisions contained in the Regulations shall be inoperative, not the

> provisions of the other statutes mentioned in the Regulation 103. The Tribunal in this regard correctly understood the Regulation but wrongly refused the relief on the ground that no reinstatement can be ordered on a regular employment in view of the provisions contained in the said Regulation. But the High Court read the Regulation otherwise and plainly misunderstood it in saying that if there is any inconsistency between the Regulations and the Industrial Disputes Act, 1947 and other labour laws for the time being in force the Regulations will prevail and the Industrial Disputes Act, 1947 and other labour laws shall be deemed to be inoperative. This misreading and wrong approach of the High Court resulted in wrong conclusion. In the view it took as to Regulation 103 the High Court proceeded to State that even if there was retrenchment in view of Regulation 5 of the Regulations the Labour Court was not competent to direct reinstatement of the appellant who was not recruited in terms of Regulation 5 because the Labour Court had to act within the ambit of law having regard to the Regulations by which the workman was governed. In this view the High Court declined relief to the appellant which in our view cannot be sustained. The Tribunal felt difficulty in ordering reinstatement as the appellant was not a regular employee. The appellant ought to have been ordered to be reinstated in service once it was found that his services were illegally terminated in the post he was holding including its nature. Thus in our opinion, both the Tribunal as well as the High Court were not right and justified on facts and in law in refusing the relief of back wages. But, however, having regard to the facts and circumstances of the case and taking note of the fact that the order of termination dates back to 19.7.1985 we think it just and appropriate in the interest of justice to grant back wages only to the extent of 50%."

#. Similarly, so far as the contention that Section 25-F of the Industrial Disputes Act, 1947 has not been complied with by the petitioner. The view taken by the Apex Court in case of MANAGEMENT OF M.C.D. v. PREM CHAND GUPTA reported in AIR 2000 SC 454, the relevant observations of the Apex Court in para-16 are quoted as under :-

"To recapitulate, it is a well established fact on the record of this case that the respondent workman though initially appointed for one year from 5.5.1964 on a temporary post of Section Officer (Civil) was continued in service after expiry of that year. His very appointment order of 5.5.1964 mentioned that he could be considered for confirmation after one year of satisfactory service. Even though he was never confirmed, the appellant-Corporation did not terminate his services but continued him in service. Not only that, but on 1.1.1964 after giving a short break in service and he was reappointed against a vacant post caused by termination of service of another employee. Thus, atleast from 1.1.1964 even though in temporary service, he continued to work on a vacant permanent post of Section Officer (Civil) and continued to serve as such for further 18 months upto 29.4.1966 when he was visited with the impugned termination order. By that time he had completed not less than 240 days of continuous service for one calendar year immediately preceding 29.4.1966 i.e. from 1.4.1965 to 29.4.1966. Consequently, Section 25-F of the I.D.Act, 1947 got squarely attracted in his case. It reads as follows :

"25-F. Conditions precedent to retrenchment of workmen. - No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice.

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay (for every completed year of continuous service) or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government (or such authority as may be specified by appropriate Government by notification in the Official Gazette.)"

It is not in dispute between the parties that

> these requirements were not complied with by the appellant - Corporation while terminating the respondent - workman's service. The Labour Court rightly held accordingly. However, having so held on facts, the labour Court found that Section 25-F would not apply for the reason that the respondent - workman's service were not terminated because of his being an excess staff. The said reasoning of the Labour Court ran parallel to the earlier decisions of this Court which had taken such a view of interpretation of Section 25-F. But the said line of reasoning no longer held the filed in the light of the later decision of this Court. In the case of The State Bank of India v. Shri N. Sundara Money (1976) 1 SCC 822 : (AIR 1976 SC 1111 : 1976 Lab IC 769), a three Judge Bench of this Court interpreting Section 25-F read with Section 2(oo) of the I.D. Act, speaking through Krishna Iyer, J. in para 9 of the report clearly aid down that in Section 2(oo) the word 'termination' for any reason whatsoever is the key word. Whatever the reason, every termination spells retrenchment. A termination takes place where a term expires either by the active step of the master or the running out of the stipulated term. The said decision of the three Judge Bench was approved by a Constitution Bench of this Court in the case of Punjab Land Development and Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh (1990) 3 SCC 682. In view of this settled legal position, therefore, it must be held that termination of services of the respondent - workman on 29-4-1966 which was admittedly not by way of punishment clearly amounted to retrenchment attracting Section 25-F of the I.D. Act."

#. This Court has perused the entire award passed by the labour court in question and also considered the observations made by the Apex Court in above referred two cases. The labour court has come to its conclusion on the basis of the evidence which were placed before the Labour Court. These are fact findings given by the labour court on the basis of the evidence led before the labour court by the parties. This Court is having limited powers under Article 226 and 227 of the Constitution. So far the powers of this Court, the Apex Court has considered this aspect in following recent decisions. However, it is settled position of law that the powers of this Court are very limited while examining

the legality and validity of the award passed by the labour court. The view taken by the Apex Court in Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union and Another reported in 2000 SCC [Labour and Service] pg.471, the Apex Court has held that while exercising the powers under Article 226 and 227 of the Constitution, interference with pure finding of fact and Reappreciation of the evidence is held to be impermissible. The High Court does not exercise appellate jurisdiction under Article 226. Even insufficiency of evidence or that another view is possible, it is held that no ground to interfere with the findings of the Industrial Tribunal. Recently also, the Apex Court has considered this aspect in case of SUGARBAI M. SIDDIQ AND OTHERS V. RAMESH S. HANDKARE reported in 2001 [8] SCC pg.477, the Apex Court has held that scope of powers of High Court is concerned not with the decision of the lower court / tribunal but with its decision-making process. High Court must ascertain whether such Court or tribunal had jurisdiction to deal with a particular matter and whether the order in question is vitiated by procedural irregularity, then only High Court can interfere with, otherwise, not.

#. I have considered the decisions of the Apex Court referred hereinabove, wherein the powers of this Court while examining the legality and validity of the award of the labour court and tribunal. Learned advocate Mr.Nirzar Desai appearing on behalf of the petitioner has failed to point out any jurisdictional error and any procedural irregularity committed by the labour court. Therefore, according to my opinion, the labour court has passed award which is just and proper in accordance with law. As such, no error has been committed by the Labour Court and therefore, no interference is required. Therefore, there is no substances in the present petition and same is ordered to be rejected. Rule discharged. No order as to costs.

Date : 18-1-2002 [H.K.Rathod, J.]

#kailash#